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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gabriel Flores-Delgado,
10
11 Petitioner,
12 v.
13 Loretta Lynch, et al.,
14 Respondents.

No. CV-15-01273-PHX-JAT (BSB)

**REPORT AND
RECOMMENDATION**

15 In June 2015, Petitioner Gabriel Flores-Delgado, who was previously detained in
16 the Mesa Verde Detention Center in Bakersfield, California, filed a Petition for Writ of
17 Habeas Corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the
18 Central District of California.¹ (Doc. 19.) The action was subsequently transferred to the
19 United States District Court for the Eastern District of California. (*Id.*) On July 8, 2015,
20 the Eastern District of California transferred the case to this district. (*Id.*) Petitioner then
21 filed a First Amended Petition that the Court dismissed with leave to amend. (Doc. 17.)
22 On August 31, 2015, Petitioner filed a Second Amended Petition (Petition). (Doc. 18.)
23 Respondents argue that the Petition should be denied because Petitioner is not entitled to
24 relief. (Doc. 25.) Petitioner has filed a “Response in Opposition to the Respondents for
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26
27 ¹ Petitioner was transferred to California in April 2015 due to bed space issues in
28 the Eloy Detention Center (EDC) in Eloy, Arizona. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 1,
43, 44.) He was transferred back to EDC on June 2, 2015. (*Id.*)

1 Writ of Habeas Corpus” (Petitioner’s Reply).² (Doc. 26.) Petitioner also filed a Motion
 2 to Expedite Release. (Doc. 27.) As discussed below, the Court recommends that the
 3 Petition and the motion be denied.

4 **I. Factual and Procedural History**

5 Petitioner, a native and citizen of Mexico, is currently detained at the Eloy
 6 Detention Center (EDC) in Eloy, Arizona, awaiting a ruling from the United States Court
 7 of Appeals for the Ninth Circuit (Ninth Circuit) on his petition for review. A temporary
 8 stay of removal is in effect. (Doc. 25, Ex. 1, Baeza Decl.) The procedural history is
 9 discussed in detail below.³

10 **A. Removal Proceedings in Oregon and Washington**

11 On April 14, 2010, the Circuit Court of the State of Oregon, Marion County,
 12 convicted Petitioner of Sexual Abuse in the Second Degree. (Doc. 25, Ex. 1, Baeza
 13 Decl. at ¶ 6; Attachment B.) On April 15, 2010, Petitioner was taken into the custody of
 14 U.S. Immigrations and Customs Enforcement (ICE) and issued a Notice to Appear
 15 (NTA), alleging that Petitioner was removable under Section 212(a)(6)(A)(i) of the
 16 Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present
 17 in the United States without being admitted or paroled, or who arrived in the United
 18 States at any time or place other than designated by the Attorney General. (Doc. 25,
 19 Ex. 1, Baeza Decl. at ¶ 7, Attachment C.)

20 Petitioner was transferred to the Northwest Detention Center (NDC) in Seattle,
 21 Washington, pending a hearing before an Immigration Judge (IJ). (*Id.* at ¶ 7.) On May
 22 11, 2010, Petitioner appeared before an IJ who reset his case to August 2, 2010. (*Id.* at
 23 ¶ 8.) That same day, Petitioner had a bond hearing and the IJ set bond at \$2,000. (*Id.*,

25 ² Petitioner’s reply discusses his eligibility for cancellation of removal and for
 26 relief from removal. (Doc. 26 at 10-16.) Petitioner did raise these issues in this Petition
 27 and the Court will not consider issues raised for the first time in a reply. *See Zamani v.*
 28 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d 1039,
 1048 (9th Cir. 2003) (stating that the district court need not consider arguments raised for
 the first time in a reply brief.)).

³ The procedural history is based on the declaration of Lorenzo Baeza. (Doc. 25,
 Ex. 1.) Petitioner does not dispute the procedural history as set forth in that declaration.

1 Attachment D.) On July 30, 2010, Petitioner posted bond and was released from ICE
2 custody. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 9.)

3 On August 11, 2011, Petitioner failed to appear for a hearing that was scheduled
4 before an IJ in Seattle, Washington and was ordered removed to Mexico in absentia. (*Id.*,
5 Attachment E.) On August 27, 2011, ICE removed Petitioner to Mexico based on his
6 final order of removal. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 11.)

7 On October 21, 2011, Petitioner filed a motion to reopen the removal proceeding
8 arguing that he failed to appear at the August 11, 2011 hearing because he was in custody
9 pursuant to a bench warrant. (*Id.*, at ¶ 12, Attachment F.) On November 8, 2011, an IJ
10 granted Petitioner's motion to reopen that proceeding. (*Id.* at ¶ 13, Attachment G.)

11 **B. Removal Proceedings in Arizona**

12 On March 9, 2012, Petitioner re-entered the United States at or near Sasabe,
13 Arizona, without inspection or parole by an immigration officer. (*Id.* at ¶ 14.) On March
14 11, 2012, Petitioner was detained and issued a Notice of Intent/Decision to Reinstate
15 Prior Order of Removal. (*Id.*)

16 On July 30, 2012, Petitioner was convicted in the United States District Court for
17 the District of Arizona of violating 19 U.S.C. § 1459(e)(1), Failure to Enter into the
18 United States at a Designated Border Crossing Point. (*Id.* at ¶ 15, Attachment H.)
19 Petitioner was released to ICE custody in Florence, Arizona, pursuant to an immigration
20 detainer. (Doc. 25, Ex. 1 Baeza Decl. at ¶ 15.) On September 17, 2012, Petitioner
21 appeared before an IJ who reset the case to November 5, 2012. (*Id.* at ¶ 17.)

22 On October 19, 2012, DHS filed Additional Charges of
23 Inadmissibility/Deportability, charging Petitioner as removable under INA
24 § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime
25 involving moral turpitude. (*Id.* at ¶ 18, Attachment I.) On November 29, 2012, the IJ
26 sustained the additional charge of removability and found Petitioner ineligible to apply
27 for cancellation of removal. (*Id.* at ¶ 19.) The IJ also denied voluntary departure and
28 ordered Petitioner removed to Mexico. (*Id.*, Attachment J.) Petitioner reserved his right

1 to appeal, and filed a timely appeal with the Board of Immigration Appeals (BIA) on
 2 December 21, 2012. (*Id.* at ¶ 19.) On April 15, 2013, the BIA dismissed Petitioner's
 3 appeal and upheld the IJ's November 29, 2012 decision ordering Petitioner removed to
 4 Mexico and pretermittting his application for cancellation of removal under
 5 INA § 240A(b)(1). (*Id.* at ¶ 20, Attachment K.)

6 On August 16, 2013, Petitioner filed a motion to reopen the BIA's April 15, 2013
 7 decision. (*Id.* at ¶ 29.) On September 23, 2013, the BIA construed the motion as a
 8 motion for reconsideration and denied it. (*Id.* at ¶ 29, Attachment R.) On October 18,
 9 2013, Petitioner filed a petition for review of the BIA's September 23, 2013 decision in
 10 the Ninth Circuit in Case No. 13-73691. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 31.) The
 11 Ninth Circuit granted Petitioner a temporary stay of removal while his petition for review
 12 remained pending.⁴ (*Id.*, Attachment T.)

13 On June 18, 2013, Petitioner filed another petition for review with the Ninth
 14 Circuit in Case No. 13-72155. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 23, Attachment O.) This
 15 appeal is currently pending a decision.⁵ (*Id.*) On March 19, 2014, the Ninth Circuit
 16 combined Petitioner's petitions for review in Case Nos. 13-72155 and 13-73691.
 17 (Doc. 25, Ex. 1, Baeza Decl. at ¶ 35.) A temporary stay of removal is still in effect. (*Id.*)

18 **C. Bond Hearing and Custody Redetermination**

19 On July 12, 2013, Petitioner's custody status was reviewed and it was determined
 20 that he should remain in custody. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 26.) On July 14,

22 ⁴ Several months earlier, on February 21, 2013, before the BIA dismissed
 23 Petitioner's appeal, Petitioner filed a petition for review and a motion for temporary stay
 24 of removal with the Ninth Circuit in Case No. 13-70643. (Doc. 25, Ex. 1, Baeza Decl. at
 25 ¶ 22, Attachment M.) The Ninth Circuit granted a temporary stay of removal while the
 petition for review remained pending. (*Id.*) On June 18, 2013, the Ninth Circuit
 dismissed the petition for review in Case No. 13-70643 for lack of jurisdiction. (*Id.* at ¶
 23; Attachment N.)

26 ⁵ On July 31, 2013, Petitioner filed a Motion to Reopen his removal proceedings
 27 with the Immigration Court in Florence, Arizona. (*Id.* at ¶ 28.) On August 13, 2013, the
 28 IJ denied the motion. (*Id.* at ¶ 28; Attachment Q.) On July 17, 2015, the BIA denied
 Petitioner's Motion to Reopen as moot. (*Id.* at ¶ 46, Attachment AA.)

1 2013, a Post Order Custody Review was conducted. (*Id.* at ¶ 27.) On July 24, 2014, it
2 was determined that Petitioner should remain in custody.⁶ (*Id.*)

3 On October 4, 2013, Petitioner had a bond hearing before an IJ in Florence,
4 Arizona. (*Id.* at ¶ 30.) That same date, the IJ denied Petitioner's request for a change in
5 custody based on his conclusion that Petitioner represented a danger to the community
6 and a flight risk. (*Id.* at ¶ 30, Attachment S.) Petitioner reserved his right to appeal. (*Id.*)
7 On October 23, 2013, Petitioner timely appealed the IJ's October 4, 2013 decision to the
8 BIA. (*Id.* at ¶ 32.)

9 Petitioner had another bond hearing in November 2013 before an IJ in Florence,
10 Arizona. (*Id.* at ¶ 33, Attachment U.) In a November 15, 2013 decision, that was filed on
11 November 18, 2013, the IJ denied Petitioner's request for bond based on his finding that
12 Petitioner was a danger to the community and a flight risk. (*Id.* at ¶ 33, Attachment U;
13 Doc. 25, Ex. 2.) On February 7, 2014, the BIA affirmed the IJ's November 18, 2013
14 decision. (Doc. 25, Ex.1, Baeza Decl. at ¶ 34, Attachment V.)

15 On April 25, 2014, Petitioner's custody was reviewed by an IJ in Florence,
16 Arizona. His request for bond was denied based on the IJ's conclusion that Petitioner
17 was a danger to the community and a flight risk. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 36,
18 Attachment W.) On May 14, 2014, Petitioner appealed the IJ's decision denying him
19 bond to the BIA. (*Id.* at ¶ 38.) On December 19, 2014, the BIA adopted and affirmed the
20 IJ's April 25, 2014 order denying Petitioner's request for a change in custody status.
21 (*Id.* at ¶ 40, Attachment X.) In its decision, the BIA agreed with the IJ that Petitioner
22 failed to present materially changed circumstances since the prior bond order, and that he
23 remained both a danger to the community and a flight risk. (Doc. 25, Attachment X.)

24 On January 12, 2015, Petitioner's custody status was reviewed by an IJ in
25 Florence, Arizona. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 41.) That same day, the IJ denied
26 Petitioner's request for bond based on his finding that Petitioner was a danger to
27 community and a flight risk. (Doc. 25, Ex. 1, Baeza Decl., Attachment Z.)

28 ⁶ The Baeza declaration does not identify who conducted these custody reviews.

On July 17, 2015, Petitioner filed a “request for a bond hearing pursuant to *Casas-Castrillon*.”⁷ (*Id.* at ¶ 46.) On August 31, 2015, an IJ in Eloy, Arizona denied Petitioner’s request for another bond hearing. (*Id.* at ¶ 46, Attachment BB.) Petitioner appealed that decision to the BIA. (*Id.* at ¶ 46.) That appeal was pending as of the date the government filed its response. (*Id.* at ¶ 46, Attachment CC.)

C. Petition for U-Nonimmigrant Status Visa

In the meantime, on February 11, 2013, Petitioner filed a Petition for a U-Nonimmigrant Status Visa (U Visa) with the U.S. Citizenship and Immigration Services (USCIS), Vermont Service Center. (*Id.* at ¶ 21, Attachment L.) On June 26, 2013, USCIS denied Petitioner’s petition for a U-Visa due to a lack of initial evidence, Petitioner’s inadmissibility, and the lack of records indicating Petitioner had been approved for benefits under the U-Nonimmigrant Interim Relief program. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 24, Attachment L.)

On July 9, 2013, Petitioner filed a motion to reopen and a motion for reconsideration of his petition for a U Visa with USCIS. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 25, Attachment P.) On April 30, 2014, USCIS, dismissed that motion. (*Id.* at ¶ 37, Attachment P.) On June 3, 2014, Petitioner filed with USCIS another motion to reopen and a motion to reconsider the denial of his petition for a U Visa. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 39.) On March 12, 2015, USCIS denied Petitioner’s second motion to reopen and motion to reconsider the denial of his petition for a U Visa. (*Id.* at ¶ 42.)

D. Federal Petition for Writ of Habeas Corpus

On August 31, 2015, Petitioner filed his pending Petition raising three grounds for relief. (Doc. 18.) In Grounds One and Three, Petitioner alleges that his prolonged detention while his petition for review is pending before the Ninth Circuit violates his

⁷ The Baeza declaration refers to the April 25, 2014 and January 12, 2015 proceedings as “bond hearings.” (Doc. 25, Ex. 1, Baeza Decl. at ¶¶ 36, 41.) However, Respondents’ briefing does not characterize these proceedings as bond hearings under *Casas-Castrillon v. Dep’t. of Homeland Security*, 535 F.3d 942, 948 (9th Cir. 2008), in which the Ninth Circuit held that an alien subject to prolonged detention under 8 U.S.C. § 1226(a) is entitled to an individualized hearing before an immigration judge. (Doc. 25.)

1 right to procedural and substantive due process. (Doc. 1 at 4, 6.) In Ground Two,
 2 Petitioner simply states “Denial of Bond.” (Doc. 1 at 5.) As set forth below, the Court
 3 concludes that Petitioner is not entitled to relief and recommends that his Petition be
 4 denied.

5 **II. Denial of Bond**

6 In Ground Two, Petitioner appears to challenge the denial of bond, however, he
 7 does not refer to a specific bond determination, or cite any facts or law to support his
 8 claim. (Doc. 1 at 5.) Petitioner’s unsupported, conclusory allegations are insufficient to
 9 establish that he is entitled to habeas corpus relief. *See Shah v. United States*, 878 F.2d
 10 1156, 1161 (9th Cir. 1989) (vague or conclusory claims without supporting factual
 11 allegations warrant summary dismissal of § 2255 motion); *see also Jones v. Gomez*, 66
 12 F.3d 199, 204 (9th Cir. 1995) (quoting *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (“It
 13 is well-settled that ‘[c]onclusory allegations which are not supported by a statement of
 14 specific facts do not warrant habeas relief’”)).

15 Moreover, as Respondents argue (Doc. 25 at 9-10), the IJ’s discretionary decisions
 16 granting or denying bond are not subject to judicial review. *See* 8 U.S.C. § 1226(e);⁸
 17 *Prieto-Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008) (stating that “[t]he alien
 18 may appeal the IJ’s bond decision to the BIA . . . but discretionary decisions granting or
 19 denying bond are not subject to judicial review.”). Accordingly, this Court lacks
 20 authority to review the IJ’s discretionary bond decisions and, therefore, Petitioner is not
 21 entitled to habeas corpus relief on Ground Two.

22 **III. Due Process Claims**

23 In Grounds One and Three, Petitioner alleges that his detention is not authorized
 24 by statute and violates his rights to substantive and procedural due process. (Doc. 1 at 4,
 25 6.) Petitioner requests a bond hearing.

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 27 ⁸ Section 1226(e) states that “[t]he Attorney General’s discretionary judgment
 28 regarding the application of this section shall not be subject to review. No court may set
 aside any action or decision by the Attorney General under this section regarding the
 detention or release of any alien or the grant, revocation, or denial of bond or parole.” 8
 U.S.C. § 1226(e).

1 As set forth in Section I, Petitioner was issued a final order of removal, he
2 appealed it to the BIA, and the BIA dismissed the appeal. (Doc. 25, Ex. 1, at ¶¶ 19, 20,
3 Attachments J, K.) Thereafter, Petitioner filed a petition for review with the Ninth
4 Circuit from the BIA's original decision and from its subsequent denial of a motion to
5 reopen. (*Id.* at ¶¶ 23, 31, Attachments O, T.) Petitioner has obtained a stay of removal
6 pending the Ninth Circuit's decision.

7 Under these circumstances, Petitioner's detention is authorized "under the
8 Attorney General's general, discretionary detention authority under [8 U.S.C.] § 1226(a)
9 [which] authorizes the Attorney General to detain an alien 'pending a decision on
10 whether the alien is to be removed from the United States.'" *Casas-Castrillon v. Dep't of*
11 *Homeland Security*, 535 F.3d 942, 948 (9th Cir. 2008) (holding that the government is
12 authorized to detain an alien who has been "subjected to a prolonged detention pending
13 judicial review" of removal proceedings when the government provides adequate
14 procedural protections). However, the Attorney General's discretionary detention
15 authority is not unlimited. Discretionary detention authority under 8 U.S.C. § 1226(a) is
16 limited to the "period reasonably necessary to bring about [an] alien's removal from the
17 United States." *Prieto-Romero*, 534 F.3d at 1062 (quoting *Zadvydas v. Davis*, 533 U.S.
18 678, 689, 121 (2001)). This period can include the time in which judicial relief from the
19 removal order is sought because, absent facts that would prevent a petitioner's removal to
20 another country, an alien "foreseeably remains *capable* of being removed — even if it
21 has not yet finally been determined that he *should* be removed — and so the government
22 retains an interest in 'assuring [his] presence at removal.'" *Prieto-Romero*, 534 F.3d at
23 1065 (quoting *Zadvydas*, 533 U.S. at 699).

24 Although § 1226(a) authorizes Petitioner's detention pending judicial review of
25 his final order of removal, the Attorney General cannot detain Petitioner for a prolonged
26 period of time without providing him an individualized hearing before an immigration
27 judge. The Ninth Circuit has held that 8 U.S.C. § 1226(a), discretionary detention of an
28 alien, must be construed as requiring a bond hearing for the alien. *Casas-Castrillon*, 535

1 F.3d at 951. Due process “requires ‘adequate procedural protections’ to ensure that the
 2 government’s asserted justification for physical confinement ‘outweighs the individual’s
 3 constitutionally protected interest in avoiding physical restraint.’” *Prieto–Romero*, 534
 4 F.3d at 1065 (quoting *Zadvydas*, 533 U.S. at 690-691). “[P]rolonged detention of aliens
 5 is permissible only where the Attorney General finds such detention individually
 6 necessary by providing the alien with an adequate opportunity to contest the necessity of
 7 his detention.” *Casas-Castrillon*, 535 F.3d at 951. “Thus an alien is entitled to release on
 8 bond unless the ‘government establishes that he is a flight risk or will be a danger to the
 9 community.’” *Id.* at 951 (quoting *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)).

10 Petitioner has been in custody pursuant § 1226(a) for several years. However, in
 11 October or November 2013, Petitioner received a bond hearing before an IJ in accordance
 12 with *Casas-Castrillon*.⁹ (Doc. 25, Ex. 1, Attachment BB; Ex. 2.) The IJ stated that the
 13 burden was on DHS to establish by clear and convincing evidence that Petitioner should
 14 not be released pending judicial review of his removal order because he is a danger to the
 15 community or a flight risk. (Doc. 25, Ex. 2 at 5.) The IJ found that the government met
 16 its burden. (*Id.* at 9.) In evaluating Petitioner’s dangerousness, the IJ referenced
 17 Petitioner’s criminal history including crimes involving forcible sodomy, assault, and
 18 theft. (*Id.* at 6-8.) The IJ next determined that Petitioner was a flight risk based on his
 19 history of failing to comply with immigration orders, his limited ties to the United States,
 20 and a disincentive for him to appear given the apparent weakness of his case. (*Id.* at 8-9.)
 21 Petitioner appealed that decision to the BIA, which affirmed the IJ’s decision on February
 22 7, 2014. (Doc. 25, Ex. 1, Attachment V.)

23 In addition, Petitioner has received numerous other custody reviews. (Doc. 25,
 24 Ex. 1 at ¶¶ 30, 36, 38, 41, 46.) On August 31, 2015, the IJ denied another request for a
 25 bond hearing under *Casas-Castrillon*. (Doc. 25, Ex. 1, Baeza Decl. at ¶ 46, Attachment

26
 27 ⁹ The Baeza declaration states that Petitioner had bond hearings on October 4,
 28 2013 and on November 18, 2013. (Doc. 25, Ex. 1, Baeza Decl. at ¶¶ 30, 33.) The IJ’s
 November 15, 2013 order, that was filed on November 18, 2013, refers to the October 4,
 2013 bond hearing, but does not mention a hearing in November 2013. (Doc. 25, Ex. 2 at
 3.)

BB.) The IJ noted that Petitioner did not argue, much less demonstrate, pursuant to 8 C.F.R. § 1003.19(e), as was his burden, that his circumstances had materially changed and, thus, warranted a new bond hearing. (Doc. 25, Ex. 1, Attachment BB at 2.)

Considering Petitioner's bond hearing pursuant to *Casas-Castrillon* in the fall of 2013, and his subsequent custody reviews, his detention is not unlawful. Accordingly, the Court recommends that Petitioner's request for habeas corpus relief and a bond hearing be denied.

IV. Motion for Expedited Release

After the Petition was fully briefed, Petitioner filed a motion for expedited release under 28 U.S.C. § 1254(a). (Doc. 27.) The motion states that Petitioner appeals the IJ's denial of cancellation of removal and appears to raise similar challenges to Petitioner's detention as he asserts in the pending Petition. The Court recommends that the motion be denied for the reasons set forth above.

V. Conclusion

Petitioner has not shown that his current detention is not authorized by statute, or that it is a violation of due process. Although Petitioner's detention has been lengthy, it is properly related to his ongoing removal proceedings, and he has been afforded an independent bond hearing by the Immigration Court and that decision was affirmed by the BIA. Petitioner is not entitled to additional relief.

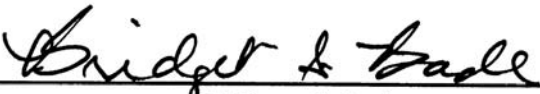
Accordingly

IT IS RECOMMENDED that Petitioner's Second Amended Petition for Writ of Habeas Corpus (Doc. 18) and Motion for Expedited Release (Doc. 27) be **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1), should not be filed until entry of the District Court's judgment. The parties have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6 and 72. Thereafter, the parties have fourteen days within

1 which to file a response to the objections. Failure to file timely objections to the
2 Magistrate Judge's Report and Recommendation may result in the District Court's
3 acceptance of the Report and Recommendation without further review. *See United States*
4 *v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

5 Dated this 15th day of December, 2015.

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8 Bridget S. Bade
9 United States Magistrate Judge
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